CEKAL BERJASA SDN BHD

v.

MALAYSIA BUILDING SOCIETY BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CODE NO: 22-170-2003]
15 OCTOBER 2004

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Principles applicable - Triable issues - Balance of convenience - Damages - Status quo of parties*

This was an application by the plaintiff seeking an injunction restraining the defendant from proceeding with the auction of two pieces of land, of which the plaintiff was the registered proprietor and chargor, and the defendant the registered chargee. The charges were executed as security for certain loan facilities granted by the defendant to one Penangan Holdings Sdn Bhd ('Penangan'). Penangan defaulted, and the defendant obtained orders for sale of the land from the High Court and the Land Administrator respectively. Penangan was subsequently wound up, and the plaintiff approached the defendant with proposals to settle the outstanding sums due to the defendant from Penangan ('the settlement agreement'). The defendant accepted, subject to certain terms and conditions, and then decided against proceeding with the settlement agreement. The plaintiff averred that there was a binding settlement agreement between the plaintiff and the defendant, and that it constituted a serious issue for trial. The plaintiff also contended that the defendant's sudden and unexplained decision not to proceed with the settlement agreement smacked of bad faith. The defendant argued that this court should not grant the injunction restraining the defendant, a secured creditor under the National Land Code, from exercising its statutory right to enforce its security upon Penangan's default of the loan facilities. The only issue requiring determination was whether or not an injunction to restrain the execution of the two orders for sale should be granted.

Held (allowing the application):

[1] On the facts, the execution of the settlement agreement by the plaintiff on 11 February 2003 and the payment of the sum of RM500,000 by the plaintiff with its solicitors for release by the defendant constituted a concluded contract between the plaintiff and the defendant. These were facts that certainly posed serious issues for trial. The fact that the defendant had not executed the settlement agreement would not affect the validity of the concluded contract; there was a binding agreement between the parties. Thus, the plaintiff had a good cause of action against the defendant. (p 164 b-f)

[2] If the interlocutory mandatory injunction were to be granted by this court and the plaintiff should fail at the trial, the defendant would not suffer any loss because its security in the lands was still intact. On the other hand, if the interlocutory mandatory injunction were refused, the plaintiff would lose the land and the right to develop the land under the settlement agreement. The rights of some 907 purchasers would be greatly affected if this application were not acceded to. The balance of convenience clearly lay with the plaintiff and not the defendant. On the facts, the undertaking by the plaintiff to pay damages was sufficient, and it must also be borne in mind that the plaintiff had deposited a sum of RM500,000 with its solicitors which would be released to the defendant upon execution of the settlement agreement. Hence, it would be prudent to maintain the *status quo* of the respective parties. (pp 169 a-e & 170 e-g)

Case(s) referred to:

Allen v. Jambo Holdings Ltd [1980] 2 All ER 502 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(foll)***

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Associated Cement Co Ltd v. State of Rajasthan AIR [1981] Raj 133 ***(refd)***

Ayre v. Craven [1834] 2 Ad & E1 2 ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1990] 2 CLJ 973 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chan Kok Choon v. United Malayan Banking Corp Bhd [1998] 2 CLJ 731 CA ***(refd)***

Chattell v. Daily Mail Publishing Co Ltd [1901] 18 TLR 165 ***(refd)***

Dikush Desai v. Don Bros Co AIR [1981] Goa 34 ***(refd)***

Fairview Schools Bhd v. Indrani Rajaratnam & Ors (No 2) [1998] 1 CLJ 285 CA ***(refd)***
Films Rover International Ltd & Ors v. Cannon Film Sales Ltd [1986] 3 All ER 772 ***(refd)***
Francome v. Mirror Group Newspapers Ltd [1984] 2 All ER 408 ***(refd)***
Gallwey v. Marshall [1853] 9 Exch 294 ***(refd)***
Haribandhu Das v. Asoka Industries (P) Ltd AIR [1984] Ori 104 ***(refd)***
Hatchard v. Mege [1887] 18 QBD 771 ***(refd)***
In the Matter of an Application for A Writ of Prohibition and In the Matter of Singapore Improvement Ordinance [1927] [1935] MLJ 217 ***(refd)***
Inglis & Anor v. Commonwealth Trading Bank of Australia [1971-1972] 126 CLR 161 ***(refd)***
Ismail & Ors v. Tayaballi Essaji & Ors [1929] Sind 182 ***(refd)***
James v. Brook [1846] 9 QB 7 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(foll)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
Krishna Chandra v. Hem Chandra 21 CLJ 469 ***(refd)***
Laguna v. Sevice Hotels Ltd [1969] 2 Ch 209 ***(refd)***
Law Kiat Long & Ors v. Pardons Board, Johore & Ors, Oie Hee Koi & Ors v. Pardons Board, Johore & Ors [1968] 2 MLJ 249 ***(refd)***
Lim Koon Ee v. Mohd Saad [1962] 28 MLJ 242 ***(refd)***
Locabail International Finance Ltd v. Agroexport [1986] 1 All ER 901 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(refd)***
National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Perwira Affin Bank Bhd v. Tan Ah Tong [2001] 5 CLJ 28 ***(not foll)***
Re CHS [2001] 8 CLJ 653 HC ***(refd)***
Sarkawi Sadijo v. BMG Music (M) Sdn Bhd & Ors [1996] 4 MLJ 515 ***(refd)***
Shepherd Homes Ltd v. Sandham [1970] 3 All ER 402 ***(refd)***
SWIM (Malaysia) Sdn Bhd v. Sanyo Murako International Co Ltd [1992] 1 AMR 42 ***(foll)***
The Mito [1987] 2 Lloyd's Rep 197 ***(refd)***
The Shamnuger Jute Factory Co v. Ram Narain Chatterjee 14 C 189 ***(refd)***
Thomas M Heysek v. Boyden World Corp [1989] 1 MLJ 219 ***(refd)***
United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***
Van Joel v. Hornsey [1895] 2 Ch 774 ***(refd)***
Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 2 MLJ 21 ***(refd)***

Legislation referred to:
National Land Code, ss. 256(3), 257, 258, 259, 263, 264, 264A, 265

For the plaintiff - Zainur Zakaria (Anita Stephen); M/s Philip Choong & Co
For the defendant - Wong Kian Kheong (Yap Boon Hau); M/s Lee Hishammuddin

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

The Prayers Sought For In encl. 4

By way of encl. 4, the plaintiff sought the following prayers:

(a) An injunction restraining the Defendant, whether on its own or by its employees or agents from proceeding with the auction of land held under Grant of Mukim No. GM1753, Lot No. 3255, Mukim 13 Tempat Thean Teik Estate, Daerah Timur Laut, Pulau Pinang measuring approximately 1909.6073 square metres (0 acre, 1 rood, 35,500 poles) and land held under Grant No. 57691, Lot 3254 Mukim 13, Daerah Timur Laut, Pulau Pinang measuring approximately 77294.9496 square metres (19,100 acres) on 20.2.2003 until further order from this Honourable Court.

(b) Further and/or in the alternative, a mandatory injunction to compel the Defendant, whether on its own or by its employees or agents to withdraw and/or postpone the auction of land held under Grant of Mukim No, GM1753, Lot No. 3255, Mukim 13 Tempat Thean Teik Estate, Daerah Timur Laut, Pulau Pinang measuring approximately 1909.6073 square metres (0 acre, 1 rood, 35,500 poles) and land held under Grant No. 57691, Lot 3254 Mukim 13, Daerah Timur Laut, Pulau Pinang measuring approximately 77294.9496 square metres (19,100 acres) on 20.2.2003 until further order from this Honourable Court.

(c) That the application in this Summons in Chambers be fixed for hearing within 21 days from the date of an order of this Honourable Court.

The oral submissions went on for a number of days. Midway through the oral submissions, the parties agreed to a holding over injunction and the agreed terms were as follows (see encl. 7):

A holding over injunction is hereby granted pending the determination by the Court of enclosure 4. All costs of the postponement of the auction scheduled for 20.2.2003 at 10.30 a.m. in Pulau Pinang be borne by the plaintiff in any event. The plaintiff hereby undertakes to pay any damages incurred by the defendant as a result of the holding over injunction pertaining to the auction in the event enclosure 4 is dismissed by the Court.

So, a holding over injunction was granted by this court according to the terms as agreed to by the parties. That was certainly a magnanimous gesture on the part of both parties.

Again, in the midst of the oral submissions, the plaintiff saw the need to add a prayer for costs to be incorporated as prayer (d). It was allowed and it was worded by way of an amendment as follows:

> (d) that the costs of this application be paid by the defendant to the plaintiff.

I allowed the amendment purely in the interest of justice (*Yoong Leok Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21; and *Lim Koon Ee v. Mohd. Saad* [1962] 28 MLJ 242). In *Re CHS* [2001] 8 CLJ 653, the court too allowed an oral amendment to add the consent of the court to the marriage of a minor under 21 on the grounds that the document did not require service and the application was on an urgent basis. The "justice" consideration should take precedence over everything else. This seems to be the judicial trend set by those senior judges before me.

Now, the grounds in support of encl. 4 are amply set out in encl. 4 itself. I should be forgiven if I were to reproduce them verbatim:

> (1) By a letter dated 14.1.2003, the Defendant agreed to the Plaintiff's appointment of Jastac Sdn. Bhd. ('Jastac') and Poly Electronic & Electrical Sdn. Bhd. ('PEE') to replace Tiara (referring to Tiara Contours Construction Sdn Bhd) as the turnkey contractor to revive the Project (referring to the housing project known as Taman Cemerlang) subject to, *inter alia*, the following terms and conditions:
>
> (a) the Plaintiff to pay the Defendant RM500,000.00 immediately upon execution of the Loan Settlement Agreement ('Settlement Agreement'); and
>
> (b) the Plaintiff was required to execute the Settlement Agreement not later than 31.1.2003 failing which the Defendant would proceed with the auction of the lands mentioned above.
>
> (2) The Plaintiff was allowed a period of 7 days from the date of the said letter to accept the revised settlement terms failing which the Defendant reserved their rights to commence legal proceedings against the Plaintiff without further notice pursuant to the Defendant's rights and powers under the Loan Agreement and the security documents.

(3) The Plaintiff executed the Settlement Agreement, Debenture and Power of Attorney at 5.30 pm on 11.2.2003 at the office of the Defendant's Solicitors, M/S Raja Eleena Siew Ang & Associates ('Defendant's Solicitors');

(4) By a letter dated 11.2.2003, the Defendant's Solicitors confirmed the execution of the Settlement Agreement, Debenture and Power of Attorney by the Plaintiff. Copies of the Settlement Agreement were handed over to the Plaintiff for execution by the Official Receiver for the Borrower (referring to the Penangan Holdings Sdn Bhd) and existing guarantors in the presence of its Solicitors in Penang. Further:

(a) copies of the Settlement Agreements were handed over by the Defendant's Solicitors to the Plaintiff after 5.30 p.m. on 11.2.2003;

(b) the Plaintiff was unable to deliver the Settlement Agreement to the Official Receiver for the Borrower (referring to Penangan Holdings Sdn Bhd) in Penang on 11.2.2003 and 12.2.2003 as the said documents were given to the Plaintiff after 5.30 p.m. on 11.2.2003 and 12.2.2003 was a public holiday;

(c) on 13.2.2003, 5 copies of the Settlement Agreements were handed over by the Plaintiff to their Solicitors M/S Bala Mahesen & Khairudin ('Plaintiff's Solicitors') to attend to the execution of the same by the Official Assignee for the Borrower (referring to Penangan Holdings Sdn Bhd) in Penang; and

(d) on 13.2.2003, the Plaintiff's Solicitors delivered the Settlement Agreement to the Official Assignee for the Borrower (referring to Penangan Holdings Sdn Bhd) in Penang.

(5) By a letter dated 13.2.2003, the Plaintiff's Solicitors informed the Defendant, *inter alia*, that:

(a) the Official Assignee for the Borrower (referring to Penangan Holdings Sdn Bhd) would consider the proposal to rehabilitate the Project subject to certain guidelines being undertaken; and

(b) the forthcoming auction be postponed to a date to be fixed.

(6) By letter dated 13.2.2003, the Plaintiff informed the Defendant, *inter alia*, that the final Settlement Agreement was executed at the office of the Defendant's Solicitors at 5.30 p.m. on 11.2.2003 and that the Settlement Agreement had been delivered to the Official Assignee of the Borrower (referring to Penangan Holdings Sdn Bhd) for execution. By the said letter the Defendant was further requested to discontinue with the auction of the said Land forthwith.

(7) The Defendant acted unreasonably and/or mala fide and/or in breach of the Agreement referred to in paragraphs 17, 18, and 19 above in issuing a notice dated 13.2.2003 requiring the Plaintiff to procure the execution of the Settlement Agreement by the Official Receiver for the Borrower (referring to Penangan Holdings Sdn Bhd) and for delivery of the Settlement Agreement to their Solicitors M/S K. Ahmad & Yong not later than 2.30 p.m. on the same day failing which the Plaintiff would proceed with the auction of the said Land on 20.2.2003.

(8) The Defendant had by letter dated 14.2.2003 informed the Plaintiff's Solicitors that they were unable to accede to the Plaintiff's request to postpone the auction of the said Land on 20.2.2003.

(9) On 13.2.2003 the Defendant caused the publication of the advertisement in the newspaper for sale by auction on 20.2.2003 of the land held under Grant No. 57691, Lot 3254 Mukim 13, Daerah Timur Laut, Pulau Pinang measuring approximately 77294.9496 square metres (19,100 acres).

(10) On 14.2.2003 the Defendant caused the publication of the advertisement in the newspaper for sale by auction on 20.2.2003 of the land held under Grant of Mukim No. GM1753, Lot No. 3255, Mukim 13 Tempat Thean Teik Estate, Daerah Timur Laut, Pulau Pinang measuring approximately 1909.6073 square metres (0 acre, 1 rood, 35,500 poles).

(11) The Plaintiff deposited the sum of RM500,000.00 referred to in paragraph 6.1(1) of the Settlement Agreement with M/S Lai & Associates, Solicitors for release to the Defendant upon execution of the Settlement Agreement by the Plaintiff, Defendant and the Official Receiver for the Borrower (referring to Penangan Holdings Sdn Bhd).

(12) Unless restrained by this Honourable Court the Defendant would proceed with the auction of the said Land on 20.2.2003 and the Plaintiff will suffer irreparable loss and damage.

Should I allow encl. 4? That would be the pertinent question to ask.

I was asked by Mr. Zainur Zakaria, the learned counsel for the plaintiff, to look at the settlement agreement in exh. "K8" annexed to the affidavit in encl. 3. I would certainly do so. According to Mr. Zainur Zakaria, the settlement agreement was prepared by the defendant's own lawyers and recital "K" of the settlement agreement alluded to the existence of 907 purchasers of the condominium units in Taman Cemerlang. According to Mr. Zainur Zakaria, encl. 13 that was filed by the plaintiff merely reflected

the names of the 907 purchasers and the filing of encl. 13 was not meant to plug any loophole. Upon hearing the submissions of Mr. Zainur Zakaria, Mr. Wong Khian Kheong for the defendant rightly decided to concede to the admissibility of encl. 13. That being the case, the existence of 907 purchasers of the condominium units in Taman Cemerlang must be put in the forefront when considering the application in encl. 4.

The Facts And The Background

The plaintiff is the registered proprietor and chargor of two pieces of land, *viz*:

(a) Grant Mo: 57691, Lot No: 3254 Mukim 13, Daerah Timur Laut, Pulau Pinang measuring 77294.9496 square metres (19,100 acres) – held under the Registry title; and

(b) Grant Mukim No: GM 1753, Lot No: 3255, Mukim 13 Tempat Thean Teik Estate, Daerah Timur Laut, Pulau Pinang measuring approximately 1909.6073 square metres (0 acre. 1 rood. 35,500 poles) – held under Land Office Title.

For convenience, these two pieces of land will hereinafter be referred to as the "lands".

The defendant is the registered chargee of the lands. The charges were executed as security for a total sum of RM76 million worth of facilities granted by the defendant (hereinafter referred to as the "loan facilities") to Penangan Holdings Sdn Bhd (in liquidation and hereinafter referred to as "Penangan"). Penangan, in short, is the borrower of that loan facilities. The breakdown of the RM76 million loan facilities may be stated as follows:

(i) the defendant agreed to make available to Penangan a term loan of RM36 million; and

(ii) the defendant also agreed to make available to Penangan the bridging loan of RM40 million.

By a Joint Venture Agreement dated 1 July 1997 ("JVA") between the plaintiff of the one part and Penangan of the other part, the plaintiff agreed to appoint Penangan to develop the said lands or parts thereof into a mixed development to be known as Taman Cemerlang (hereinafter referred to as

the "project"). As security for the repayment by Penangan to the defendant of all monies under the loan facilities, Penangan executed and delivered to the defendant the following documents:

(a) the loan agreement to secure the loan facilities of RM76 million;

(b) a third party first legal charge for RM76 million over Lot 3254;

(c) a third party first legal charge for RM76 million over Lot 3255; and

(d) a deed of guarantee and indemnity dated 20.11.1997 (hereinafter referred to as the "Guarantee") executed by the following persons:

(i) Lee Boon Poh (NRIC No: 550929-07-517/484 4710) (Old IC) of No: 82, Jalan Masjid Negeri, 11600 Penang;

(ii) Lim Chin Chye (NRIC No: 540726-07-5499/4710753) (Old IC) of 9-2-26 Lintang Paya Terubong 3, 11060 Air Itam, Penang; and

(iii) Khoo Kok Hooi (NRIC No: 3902333) of No: 29-M, Jalan Permai 2/1, Taman Subang Permai 47500 Subang Jaya, Selangor.

Hereinafter these three personalities will be referred to as the "guarantors" and they collectively stood as guarantors to the defendant for the sum of RM76 million only together with interests thereon.

Penangan defaulted on the loan facilities and subsequently the defendant obtained orders for sale of the lands from the High Court in respect of Lot No: 3254 (hereinafter referred to as the "High Court Order for Sale") and from the Land Administrator in respect of Lot No: 3255 (hereinafter referred to as the "LA's Order for Sale").

By a court order dated 17 December 1999, Penangan was wound up and the Official Receiver ("OR") has been appointed as the liquidator of Penangan. The plaintiff approached the defendant and proposed to settle the outstanding sums due to the defendant from Penangan (hereinafter referred to as the "settlement agreement"). In short, the plaintiff sought the approval of the defendant to assume and take over the obligations and liability to repay the loan facilities to the defendant and to carry on and revive the project. It was certainly a noble gesture on the part of the plaintiff.

By a letter dated 16 April 2002, the defendant agreed to accept the proposal of the plaintiff to rehabilitate the project subject to, *inter alia*, the following terms and conditions:

(a) Tiara Contours Construction Sdn Bhd ("Tiara"), the turnkey contractor would finance the rehabilitation and completion of the project in accordance with the proposal with no additional funding from the defendant;

(b) that the defendant be appointed as the project adviser and co-signatory to the plaintiff's project and housing development account;

(c) that the plaintiff would guarantee a minimum profit of RM4 million payable to the defendant in the following manner:

(i) the sum of RM500,000 within 14 days from the date of the said letter ie, 16 April 2002; and

(ii) the sum of RM3.5 million within 48 months from the date of the said letter ie, 16 April 2002.

(d) Tiara would give the defendant a bank guarantee for RM4 million as anticipated profit.

The defendant responded and by letter dated 3 May 2002, the defendant agreed to accept the revised proposal of the plaintiff for payment of the sum of RM500,000 in the following manner:

(a) the sum of RM50,000 on 26 April 2002; and

(b) the balance of RM450,000 by way of RHB Bank cheque no: 259257 dated 31 May 2002.

In due course, the sum of RM500,000 was paid by the plaintiff to the defendant and the auction of Lot 3255 which was scheduled on 7 May 2002 was adjourned. By letter dated 16 January 2003, the land office informed Messrs K. Ahmad & Yong, solicitors for the defendant, that the auction of Lot 3255 was adjourned from 7 May 2002 to 20 February 2003 at 10.30am. And by way of a letter dated 1 August 2002 Messrs. San & Associates, solicitors for the plaintiff, informed the defendant, *inter alia*, that Tiara had withdrawn themselves as the turnkey contractor because they were unable to provide the RM4 million banker's guarantee in favour of the defendant.

It was the stand of the plaintiff that there was a binding settlement agreement between the plaintiff and the defendant and it constituted a serious issue for trial.

The learned counsel for the defendant in the person of Mr. Wong Kian Kheong objected vigorously to the plaintiff's application in encl. 4. He craved this court's indulgence to expedite the hearing of encl. 4 in view of the holding over injunction as per encl. 7. He pointed out that the indebtedness increases daily and that it has reached RM106 million. He too pointed out that the value of the lands in question cannot increase anymore. I took note of his submissions and expeditiously heard encl. 4.

It was also the submission of Mr. Wong Kian Kheong that the requirement of the OR's consent to the settlement agreement was made known to the plaintiff by the defendant from the outset of the negotiation of the settlement agreement. It was his submission that the OR's consent was never obtained in this case.

Arguments Of The Parties In Regard To encl. 4

I will consider the arguments of the parties under different sub-heads.

(1) Has The Plaintiff A Good Cause Of Action Against The Defendant?

It was argued on behalf of the defendant that the statement of claim in encl. 2 disclosed no cause of action at all. It was pointed out that the plaintiff's failure to plead agreement on the part of the OR in respect of the settlement agreement cannot be made good by reference to any affidavit evidence in encl. 3. Two authorities were cited in support of this proposition. The first was the case of *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358. The second was the case of *Fairview Schools Bhd v. Indrani a/p Rajaratnam & Ors (No 2)* [1998] 1 CLJ 285. I have no quarrel with these two authorities. But it must be emphasised that notwithstanding that the OR has yet to execute the settlement agreement that does not make the settlement agreement any less binding (*National Land Finance Co-Operative Society Ltd v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283). Mr. Wong Kian Kheong drew my attention to the many letters exhibited in encl. 3 which carried the "without prejudice" tags and he submitted that these letters cannot be held to be admissible save and except to prove whether a settlement agreement had been reached (*Malayan Banking Bhd. v. Foo See Moi* [1981] 2 MLJ 17, at p. 18; and *Chan Kok Choon v. United Malayan Banking Corp Bhd* [1998] 2 CLJ 731). Surely as a judge, I am not prevented from reading those letters. I have now read those letters and they certainly showed that a settlement agreement had been reached between the parties. In my considered view, the plaintiff's claim cannot be said to be frivolous or

vexatious. The plaintiff certainly has a good cause of action against the defendant. I have read the statement of claim. There references to the settlement agreement were made. There too references to the OR's were also made. For instance, at para. 9 of the statement of claim reference to the OR was made and that paragraph is worded as follows:

Winding Up of Borrower (referring to Penangan)

9. By a Court Order dated 17.12.1999, the Borrower was wound up and **the Official Receiver had been appointed to take over the assets, liabilities and affairs of the Borrower**.

Again reference to the OR can be seen at para. 23 of the statement of claim and it is worded in this way:

23. By a letter dated 11.2.2003, the Defendant's solicitors confirmed the execution of the Settlement Agreement, Debenture and Power of Attorney by the Plaintiff. *Copies of the Settlement Agreements were handed over to the Plaintiff for execution by the Official Receiver for the Borrower (referring to Penangan) and existing guarantors in the presence of its solicitors in Penang.* The Plaintiff further states as follows:

(a) copies of the Settlement Agreements were handed over by the Defendant's Solicitors to the Plaintiff after 5.30 p.m. on 11.2.2003;

(b) The Plaintiff was unable to deliver the Settlement Agreement to the Official Receiver for the Borrower in Penang on 11.2.2003 and 12.2.2003 as the said documents were given to the Plaintiff after 5.30 p.m. on 11.2.2003 and 12.2.2003 was a public holiday;

(c) on 13.2.2003, 5 copies of the Settlement Agreements were handed over by the Plaintiff to their Solicitors M/S Bala Mahesan & Khairudin ('Plaintiff's Solicitors') to attend to the execution of the same by the Official Receiver for the Borrower (referring to Penangan) in Penang; (and)

(d) on 13.2.2003, the Plaintiff's Solicitors delivered the Settlement Agreement to the Official Receiver for the Borrower (referring to Penangan) in Penang.

At para. 24(a) of the statement of claim, there is an averment that the OR would consider the proposal to rehabilitate the project. That para. 24 of the statement of claim is worded in this way:

24. By a letter dated 13.2.2003, the Plaintiff's Solicitors informed the Defendant, *inter alia*, that:

(a) the Official Receiver for the Borrower (referring to Penangan) would consider the proposal to rehabilitate the Project subject to certain guidelines being undertaken; (and)

(b) the forthcoming auction be postponed to a date to be fixed.

Paragraphs 25 and 26 of the statement of claim read as follows:

25. By a letter dated 13.2.2003, the Plaintiff informed the Defendant, *inter alia*, that the final Settlement Agreement was executed at the office of the Defendant's Solicitors at 5.30 p.m. on 11.2.2003 and **that the Settlement Agreement had been delivered to the Official Receiver of the Borrower** (referring to Penangan) **for execution**. By the said letter the Defendant was further requested to discontinue with the auction of the said land forthwith.

26. The Defendant acted unreasonably and/or mala fide and/or in breach of the Agreement referred to in paragraphs 17, 18, and 19 above in issuing a notice dated 13.2.2003 **requiring the Plaintiff to procure the execution of the Settlement Agreement by the Official Receiver** for the Borrower (referring to Penangan) and for delivery of the Settlement Agreement to their Solicitors M/S K. Ahmad & Yong **not later than 2.30 p.m. on the same day failing which the Plaintiff would proceed with the auction of the said land on 20.2.2003**.

Now, all these paragraphs in the statement of claim would show that:

(1) the OR knew about the settlement agreement;

(2) the OR agreed to consider the proposal to rehabilitate the project subject to certain guidelines being undertaken;

(3) the settlement agreement had been delivered to the OR for execution; and

(4) the OR has yet to execute the settlement agreement.

In my considered view, the non-execution of the settlement agreement by the OR does not and could not mean that the OR has not consented to the settlement agreement. That being the case it would be erroneous on the part of the defendant to say that the "plaintiff had failed to plead agreement on the part of the OR in respect of the settlement agreement" in the statement of claim. The plaintiff was merely, in the statement of claim, stating the material facts in a summary form (*Ayre v. Craven* [1834]

2 Ad & E1 2; *Gallwey v. Marshall* [1853] 9 Exch 294 at 300; *James v. Brook* [1846] 9 QB 7; *Hatchard v. Mege* [1887] 18 QBD 771; and *Chattell v. Daily Mail Publishing Co Ltd* [1901] 18 TLR 165, CA). Those material facts were relied upon by the plaintiff to show that it has a cause of action against the defendant and that it is entitled to the reliefs claimed. After all a plaintiff is said to have a cause of action against the defendant when he can show to the court that the defendant has done some act which constitutes an invasion of a right vested in the plaintiff or conferred or sanctioned by the substantive law. The plaintiff may even show to the court that the defendant has failed to do some act, or to discharge some duty or obligation in regard to the performance or fulfilment of which the plaintiff is entitled under the substantive law. At this juncture, it is ideal to refer to the headnotes to the case of *Sarkawi bin Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515 and I shall do so now:

> (1) An applicant asking for an interlocutory injunction, must first and foremost have a cause of action before a judge will grant him any remedy. This was especially so when the court was asked to grant an interlocutory remedy without having the benefit of a full trial. If the plaintiff could not show to court that he had a valid cause of action his application must surely fail. On the other hand, if the plaintiff could show that he had prima facie a valid cause of action, he need not go on at this stage to show that he would definitely succeed in that cause of action. He needed only to show that there was a serious question to be tried (see p. 528G-I; *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, *RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309 and *Associated Newspapers Group v. Insert Media Ltd* [1988] 2 All ER 420 followed).
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> (2) The phrase 'a serious question to be tried' meant that the court must be satisfied that the claim was not frivolous or vexatious. Implicit in that phrase, the applicant must show that he had a valid cause of action (see p 529B-C; *American Cyanamid Co v. Ethicon* [1975] 1 All ER 504 and *Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13 followed).

I have earlier found that the plaintiff's claim was not frivolous or vexatious. I now apply vigorously the principles of law enunciated by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 (CA), in adjudicating encl. 4. I have asked myself, time and again, whether the "totality of the facts presented" before me disclosed a *bona fide* issue to be tried. I would answer it in

the affirmative. And I must now proceed further. The existence of the 907 purchasers of the condominium units in the project added a new complexion to the whole case. Surely the plaintiff would suffer greater injustice if the injunction sought for was not granted bearing in mind those innocent 907 purchasers. The discretion was entirely mine to exercise and I would exercise that discretion in favour of the plaintiff. The binding settlement agreement must be taken into account and I have taken that into account when exercising my judicial discretion in favour of the plaintiff. Furthermore, the *mala fide* conduct of the defendant was also considered by this court. It must be recalled that subsequent to the execution of the settlement agreement, debenture and power of attorney by the plaintiff at about 5.30pm on 11 February 2003, the defendant's solicitors had by a letter dated 11 February 2003 confirmed the execution of the settlement agreement, debenture and power of attorney by the plaintiff. By the said letter dated 11 February 2003, the defendant's solicitors handed over to the plaintiff five (5) copies of the settlement agreements for execution by the OR for Penangan and the existing guarantors in the presence of its solicitors in Penang. By a letter dated 13 February 2003, the plaintiff informed the defendant, *inter alia*, that the final settlement agreement was executed at the office of the defendant's solicitors at 5.30pm on 11 February 2003 and that the settlement agreement had been delivered to the OR of Penangan for execution. By the same letter the defendant was further requested to discontinue with the auction of the said lands forthwith. Somehow the defendant had acted unreasonably and/or *mala fide* and/or in breach of the settlement agreement when the defendant issued a notice dated 13 February 2003 requiring the plaintiff to procure the execution of the settlement agreement by the OR of Penangan and for the delivery of the settlement agreement to their solicitors Messrs. K. Ahmad & Yong not later than 2.30pm on the same day failing which the plaintiff would proceed with the auction of the said lands on 20 February 2003 notwithstanding the fact that the very same letter was faxed on 13 February 2003 at 3.14pm. It seemed that the defendant's solicitors were not aware of the said letter dated 13 February 2003 from the defendant. The defendant's solicitors have by a letter dated 17 February 2003 requested from the plaintiff further documents pursuant to the settlement agreement and enclosed a copy of their bill for fees and disbursements relating to the stamping and registration of the settlement agreement and other loan documentation. In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461, the then Supreme Court held, *inter alia*, that in deciding whether to grant an interlocutory injunction the court must first consider whether:

(i) the plaintiff's case raises serious issues to be tried; and

(ii) whether the injunction is a means of preserving the *status quo* pending trial.

There were certainly serious issues to be tried in the present case. By way of a reiteration, I must say that the execution of the settlement agreement by the plaintiff on 11 February 2003 and the payment of the sum of RM500,000 by the plaintiff with their solicitors Messrs. Lai & Co for release to the defendant upon execution of the settlement agreement by the defendant constituted a concluded contract between the plaintiff and the defendant and these facts certainly posed serious issues for trial. The fact that the settlement agreement was not executed by the defendant will not affect the validity of the concluded contract. A classic example would be the case of *SWIM (Malaysia) Sdn Bhd v. Sanyo Murako International Co Ltd* [1992] 1 AMR 42. That was a case where the terms of the agreement were settled by a letter dated 18 May 1988 from Sanyo Japan. The agreement was then executed by Sanyo Malaysia and it was then sent to Japan on 16 June 1988 with a request that the agreement be returned after execution so that it could be stamped. The agreement was never returned by Sanyo Japan. It was the contention of Sanyo Japan that there was no concluded true mutual agreement between the parties and that they were unilaterally entitled to terminate their relationship with Sanyo Malaysia Two. Mahadev Shankar J (as he then was) held that once the parties have reached substantial agreement, it was not fatal that some points remained to be settled by further negotiations. His Lordship also held that the court will import reasonable terms in order to make the agreement effective. Applying the principles of law as enunciated by *SWIM (Malaysia) Sdn Bhd (supra)*, I must hold that on the facts and the law there was a binding agreement between the parties herein and that the defendant must be estopped from denying that there was a concluded contract. All these would show that the plaintiff has a good cause of action against the defendant.

(2) Should This Court Grant The Injunctions To Restrain The Execution Of The High Court Order For Sale And The La's Order For Sale?

The learned counsel for the defendant submitted along the following lines. That there are clear, express and comprehensive provisions in the National Land Code 1965 ("NLC") governing the sale of lands held under Registry Titles and Land Office Titles (see ss. 257, 258, 259, 263, 264, 264A and 265 of the NLC). That the NLC has exhaustively provided for the ways and means as to how the High Court Order for Sale and the LA's Order for Sale are to be executed (*Kimlin Housing Development Sdn Bhd*

(Appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274, SC). In *Perwira Affin Bank Bhd v. Tan Ah Tong* [2001] 5 CLJ 28, the High Court Judge dismissed an application for injunction to stop the sale of land by public auction. The High Court Judge was of the view that one High Court cannot set aside a final order regularly obtained from another High Court. I am not bound to follow this decision. There may be compelling reasons why the sale of any property by public auction may be injuncted, after all the object of an interlocutory injunction is simply to preserve matters pending the trial in open court.

It was the submission of the learned counsel for the defendant that in respect of the sale of the land held under Land Office Title, an order as prayed in the application in encl. 4 would affect the performance of the statutory duties of the Land Administrator to sell the land in accordance with the NLC (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1990] 2 CLJ 973; *Law Kiat Long & Ors. v. Pardons Board, Johore & Ors., Oie Hee Koi & Ors. v. Pardons Board, Johore & Ors* [1968] 2 MLJ 249; and *In The Matter Of An Application For A Writ Of Prohibition and In The Matter Of Singapore Improvement Ordinance* [1927] [1935] MLJ 217). It was pointed out that the plaintiff should have appealed against the High Court Order for Sale and the LA's Order for Sale and at the same time applied for a stay of execution of such orders. It was stressed that the availability of such remedies to the plaintiff should be a ground *per se* to refuse the application in encl. 4. With respect, the plaintiff was entitled to file enclosure 4 and the very nature of prayer (a) indicated that the plaintiff was seeking an interlocutory mandatory injunction "until further order from this Honourable Court". So in considering prayer (a) of encl. 4, the ordinary run of the mill *American Cyanamid principles (American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504) are not applicable at all. In seeking the interlocutory mandatory injunction, the plaintiff has to show that it has an unusually strong and clear case and that there are special circumstances in existence warranting this court to grant the injunction in question. This seems to be the law and it is well documented. Megarry J, in *Shepherd Homes Ltd v. Sandham* [1970] 3 All ER 402 aptly said:

> In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

And this apt speech of Megarry J, received the approval of the English Court of Appeal in *Locabail International Finance Ltd v. Agroexport* [1986] 1 All ER 901 when it said:

> … the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the *American Cyanamid* case. The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

To summarise: the plaintiff, in order to succeed in prayer (a) of encl. 4, must show a very strong and unusual case. It is rather difficult to define exactly what the plaintiff must show. Only the authorities reported in the law books would be able to provide some guidance. Be that as it may, it must be borne in mind that the court has the jurisdiction to grant mandatory injunctions even at the interlocutory stage of the proceedings (*Laguna v. Service Hotels Ltd* [1969] 2 Ch 209; *Thomas M Heysek v. Boyden World Corp* [1989] 1 MLJ 219). And this was what the plaintiff wanted this court to do. Special circumstances existed in the case of *Van Joel v. Hornsey* [1895] 2 Ch 774 which prompted the court there to grant a mandatory injunction when the defendant there speeded up the pace of the building works upon learning of the interlocutory injunction issued by the court. Likewise here, special circumstances existed when the defendant had acted unreasonably and/or *mala fide* and/or in breach of the settlement agreement when the defendant issued the notice dated 13 February 2003 requiring the plaintiff to procure the execution of the settlement agreement by the OR not later than 2.30pm on the same day even though the very letter was faxed on 13 February 2003 at 3.14pm (see exh. 10A of encl. 3). That special circumstances would certainly justify this court to grant the mandatory injunction sought for in encl. 4.

It was argued that this court should not grant the injunction to restrain the defendant, a secured creditor under the NLC, from exercising its statutory right to enforce its security upon Penangan's default of the loan facilities. It was also emphasised that this court should be slow to interfere with the rights of secured creditors who are interested to enforce their securities. Cases like *Inglis And Another v. Commonwealth Trading Bank Of Australia* [1971-1972] 126 CLR 161; and *Ismail and Others v. Tayaballi Essaji and Others* AIR [1929] Sind 182 were cited and relied upon. With respect,

these general propositions of the law should not be applied blindly without regard to the facts of each individual case. Here there was a settlement agreement and the plight of 907 purchasers of the condominium units at the project. Here too there was *mala fide* on the part of the defendant as alluded to earlier. All these gave rise to serious issues to be tried.

The case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, a decision of the Supreme Court and cited by the defendant concerns the interpretation of s. 256(3) of the NLC which states that the High Court has the right to refuse to order the sale of charged property once the High Court is satisfied as to the existence of cause to the contrary and, with respect, it was not relevant to the case at hand. Here, I was concerned with the pressing issue of whether I should grant the injunctions to restrain the execution of the High Court Order for Sale and the LA's Order for Sale. I have no qualms in granting the injunctions sought for by the plaintiff.

Balance Of Convenience

There was no specific averment in encl. 3 – the affidavit of Khoo Boo Tee, focussing on the question as to whether the balance of convenience would be in favour of allowing encl. 4. This was the complaint of the learned counsel for the defendant. It was a rather trivial complaint. The affidavit in encl. 3 carries para. 32 which is worded in this way:

> Unless restrained by this Honourable Court the defendant would proceed with the auction of the said land on 20.2.2003 and the plaintiff will suffer irreparable loss and damage.

And that would be sufficient to convey the message that the balance of convenience lies with the plaintiff. The burden lies on the plaintiff who is applying for the injunction, to show that his inconvenience exceeds that of the defendant. In law the plaintiff must make out a case of inconvenience which would entitle him to the injunction (*Associated Cement Co. Ltd v. State of Rajasthan*, AIR [1981] Raj 133; *Haribandhu Das v. Ashoka Industries (P.) Ltd*, AIR [1984] Ori 104; and *Dilkush Desai v. Don Bros. Co.*, AIR [1981] Goa 34). The paragraphs preceding para. 32 of encl. 3 set out the factual matrix that would show where the balance of convenience would lie. I hasten to add that there is no necessity to employ the words "balance of convenience" in the supporting affidavit in order to indicate where the balance of convenience would lie. The principle is now well settled. In granting or withholding an injunction, the courts exercise a judicial discretion and will weigh the amount of subsequent mischief done or threatened to be done to the plaintiff and compare it with

the harm which the injunction, if granted, would inflict upon the defendant (*The Shamnuger Jute Factory Co. v. Ram Narain Chatterjee*, 14 C., 189, 200 [1886], per Wilson and Potter JJ; and *Krishna Chandra v. Hem Chandra*, 21 CLJ 469 [1915]).

It was argued by the defendant that the balance of convenience lies in favour of refusing the application in encl. 4 for the following reasons:

(a) that the principal sums for the term loan and the bridging loan granted by the defendant to Penangan were RM36 million and RM40 million respectively and that these loan facilities were secured by the lands in question;

(b) that Penangan had defaulted in repayment of the loan;

(c) that Penangan had been wound up and there was no realistic or practical avenue for the defendant to recover the indebtedness from Penangan;

(d) the current indebtedness of Penangan to the defendant is in the region of RM106 million and there was no rebuttal by the plaintiff;

(e) that both the High Court and the Land Administrator had ordered the lands in question to be sold by public auctions in order to enable the defendant to recover the indebtedness of Penangan; and

(f) that the interest rates of 9.5% and 9.25% per annum were charged respectively for the term loan and the bridging loan.

It was also pointed out by the defendant that in the event the application in encl. 4 was allowed, there would be a further delay for the defendant to recover the loan. It was said that any further delay would result in the increase of indebtedness to the defendant and would subsequently render the proceeds of the auctions insufficient for the defendant to recover the indebtedness. It was also argued that if the application was allowed and as the trial of this matter would take a long time, even if the defendant were to succeed at the end of the trial, the defendant would suffer irreparable loss because the proceeds of the auctions would not be adequate to cover Penangan's indebtedness. This court was invited to take judicial notice that in the depressed economy of this country as well as on a global scale, there may not be any increase in the value of the lands. But it must be borne in mind that no one really knows what the future global economy would be like. It was submitted that the plaintiff has already claimed damages from the defendant and that according to the defendant was an adequate remedy.

I will now examine the arguments of the plaintiff. It was vigorously argued that the balance of convenience lay with the plaintiff. It was pointed out that if the interlocutory mandatory injunction was granted by this court and the plaintiff should fail at the trial, the defendant would not suffer any loss because its security in the lands was still intact. But on the other hand, so it was argued, that if the interlocutory mandatory injunction was refused, the plaintiff as the registered proprietor of the said lands would lose those lands and the right to develop those lands under the settlement agreement. It was emphasised that the rights of the 907 purchasers would be greatly affected if encl. 4 was not acceded to by this court. It was submitted that when the defendant had decided to enter into the settlement agreement, they must have evaluated the viability of the project. It was ingeniously argued that the defendant's sudden and unexplained decision not to proceed with the settlement agreement smacked of bad faith.

I am entitled to take into account all the relevant factors and give the appropriate weight to each factor in order to determine where the balance of convenience lies. It varies from case to case. I certainly have the unfettered discretion to deal with each case on its own merits. There were certainly *bona fide* serious issues to be tried. The balance of convenience lies with the plaintiff and not that of the defendant. I associate myself fully with the arguments advanced by the learned counsel for the plaintiff.

En passant the phrase "balance of convenience" has been described by Sir John Donaldson MR in *Francome v. Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at p. 413 at line g as a bad choice of words. This was what he said:

> Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not of convenience.

I share the sentiments of his Lordship. But in this country the expression "balance of convenience" continues to be used unabated.

Undertaking As To Damages

At para. 37 of encl. 3, the plaintiff gave an undertaking as to damages. But the defendant challenged that undertaking and stated that the plaintiff has failed to produce any evidence to show that it was able to honour its undertaking. I must put on record that I would not deny the plaintiff an interlocutory mandatory injunction simply on the ground that the plaintiff is of limited financial means (*Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502). This case is unique. The settlement agreement would certainly see the revival of the project to the benefit of the aggrieved 907 purchasers. Why should I insist that the plaintiff should fortify its undertaking when the plaintiff "might not be worth powder and shot?" (*The Mito* [1987] 2 Lloyd's Rep 197 at p. 198). A poor plaintiff is also entitled to obtain an interlocutory mandatory injunction. Being poor is not a hindrance, at all. The facts here leaned in favour of the plaintiff.

Preserving The *Status Quo*

In breach of the settlement agreement, the defendant had by letter dated 14 February 2003 informed the plaintiff's solicitors that they were unable to accede to the plaintiff's request to postpone the auction of the said lands on 20 February 2003. The defendant was still adamant and wanted to proceed with the auction of the said lands on 20 February 2003 until by consent the parties magnanimously agreed to a holding over injunction as reflected in encl. 7. So, unless restrained by this court, the defendant would proceed with the auction of the said lands and if that were to happen the plaintiff would suffer irreparable loss and damage. To me, the undertaking by the plaintiff to pay damages as reflected at para. 37 of encl. 3 would be sufficient. It must also be borne in mind that the plaintiff has deposited a sum of RM500,000 with Messrs. Lai & Co which would be released to the defendant upon the defendant's execution of the settlement agreement. It would certainly be prudent on my part to maintain the *status quo* (*Films Rover International Ltd & Ors v. Cannon Film Sales Ltd* [1986] 3 All ER 772 at p. 785). Meanwhile, the case management ought to be vigorously undertaken solely for the purpose of expediting the trial of this case.

Conclusion

For the reasons as adumbrated above, I granted an order in terms of encl. 4 for prayer (a) and for prayer (d) as amended.